EXHIBIT 1

Opening Expert Report of Jose Zagal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CATHERINE ALEXANDER, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC.; 2K GAMES, INC.; 2K SPORTS INC.; WORLD WRESTLING ENTERTAINMENT, INC.; VISUAL CONCEPTS ENTERTAINMENT; YUKE'S CO., LTD.; and YUKE'S LA INC., Defendants.	)	Case No: 3:18-cv-0966-MJR-DGW

OPENING EXPERT REPORT OF JOSE ZAGAL
ON BEHALF OF CATHERINE ALEXANDER

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I. BACKGROUND AND QUALIFICATIONS

I am a game designer and scholar. I am also an Associate Professor with the University of Utah's nationally ranked Entertainment Arts & Engineering program where, among other things, I teach courses on videogame development, design and analysis. I taught my first course on videogame development in 2000. I have also supervised multiple award-winning student videogame projects and many of my former students work at leading game studios worldwide.

My research is directly connected to videogames. My research has explored the development of frameworks for describing, analyzing, and understanding games from a critical perspective to help inform the design of better games. I am also interested in supporting games literacy and game education. My book on this topic, "Ludoliteracy: Defining, Understanding, and Supporting Games Education" was published in 2010. In 2012 I edited "The Videogame Ethics Reader", a collection of writings that provide an entry point for thinking, deliberating, and discussing ethical topics surrounding videogames. My newest book "Role-Playing Game Studies", edited in collaboration with Dr. Sebastian Deterding, provides an in-depth examination of role-playing games across different media and disciplinary contexts. I am actively engaged in game research and regularly present at international conferences on the matter. I also regularly attend and present at international game industry events such as the Game Developers Conference.

In 2016 I was honored as a Distinguished Scholar by the Digital Games Research Association (DiGRA) for my contributions to the field of game research. I am also currently the Editor-in-Chief of the academic journal Transactions of the Digital Games Research Association and I am the member of numerous editorial boards and advisory committees for game-related publications and conferences.

I received a PhD in computer science from Georgia Institute of Technology in 2008, a M.Sc. in engineering sciences and a B.S. in industrial engineering from Pontificia Universidad Catolica de Chile in 1999 and 1997. A copy of my current CV is attached as Exhibit A.

During the previous four years, I testified as an expert at trial or by deposition in *Segan LLC v. Zynga Inc.* (United States District Court for the Northern District of California, San Francisco Division), Case No. 3:14-cv-01315-VC.

I am being compensated for my work in this matter at a rate of $375/hour. No part of my compensation depends on the outcome of this litigation.

II. SUMMARY OF OPINIONS

When videogame companies choose to work with a licensed property, they do so because they expect it will help them make more money than if they did not. This means that the cost of the license should be lower than the expected increase in profit. In the case of WWE games, game companies decide which characters and events to include in their game – they do not have to include them all and they can draw on the history of the WWE not just the current wrestling stars and events. The decision of who to include is generally based on the perceived value of a particular wrestler when compared to the cost of including them in the game. Some wrestlers are thus more important (valuable) to include in the game than others. The rosters of wrestlers in a WWE game

is important to fans and the information on who is included (or not) is reported in popular videogame websites. This is also part of WWE game marketing efforts – with the information on different wrestlers drip-fed over time to the public in order to draw interest and feed speculation. Similarly, some (not all) wrestlers participate each year in the marketing and promotional efforts for WWE games – this can include promotional appearances as well as advertising materials such as commercials, posters, and the like.

Randy Orton is an important member of the WWE as well as the WWE videogames, having been featured in a large number of them over the years. Randy Orton has also been a part of promoting several titles and was featured as the cover star in WWE '12 published by THQ.

The appearance of characters in games based on real-world people is important to the game playing public. Games that fail to achieve a certain standard of verisimilitude are called out for these issues receiving negative press, reviews, as well as criticism and fan feedback. In the case of Randy Orton, fans are aware, follow, and track his appearance in videogames over the years. This is partly as a way to compare general graphical upgrades over the years but also to track Orton's changing appearance over the years, this includes his tattoos. If Orton's appearance in games where to diverge significantly from his real-world appearance, fans would both be aware of this and there would be negative feedback that could result in reduced sales.

Mr. Orton is also aware of his appearance in games commenting publicly on his opinion of his character's appearance in the game and its verisimilitude to his real-life appearance. He is appreciative when games get the details, such as his tattoos correct.

III. SUMMARY OF INFORMATION CONSIDERED

In forming the opinions expressed herein, I have relied on my knowledge, education and training, as well as the materials listed below:

1. Defendant Take-Two Interactive Software, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

2. Defendant 2k Games, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

3. Defendant 2k Sports, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

4. Defendant Visual Concepts Entertainment's Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

5. Defendant Yuke's Co., Ltd.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

6. Defendant Yuke's LA, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Admission;

7. Defendants Take-Two Interactive Software, Inc., 2k Games, Inc., 2k Sports, Inc., and Visual Concepts Entertainment's Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Production;

8. Defendants Take-Two Interactive Software, Inc., 2k Games, Inc., 2k Sports, Inc., and Visual Concepts Entertainment's Objections and Responses to Plaintiff Catherine Alexander's First Set of Interrogatories;

9. Defendant World Wrestling Entertainment, Inc.'s Objections to Plaintiff's Second Set of Requests for Admission;

10. Defendant World Wrestling Entertainment, Inc.'s Objections to Plaintiff's First Set of Requests for Production;

11. Defendant World Wrestling Entertainment, Inc.'s Objections to Plaintiff's Second Set of Interrogatories;

12. Defendants Yuke's Co., Ltd. And Yuke's La, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's First Set of Requests for Production

13. Defendants Yuke's Co., Ltd. And Yuke's La, Inc.'s Objections and Responses to Plaintiff Catherine Alexander's Second Set of Interrogatories; and

14. Take-Two_0000001-Take-Two_0000496.

IV. REMEDIES FOR COPYRIGHT INFRINGEMENT

I understand that Catherine Alexander created several tattoos on Randy Orton between 2003 and 2008 including an upper back tribal tattoo, tribal tattoos on Mr. Orton's forearms and upper arms, and sleeve tattoos consisting of a Bible verse design, a dove, a rose and skulls. Reproductions of these tattoos appear in WWK 2K16, WWE 2K17, WWE 2K18 and WWE 2K19 (the "Video Games"). For my analysis, I have considered the available remedies for copyright infringement as provided by U.S. statutes, in particular 17 U.S.C. § 504.

I understand that available remedies for copyright infringement are stated in 17 U.S.C. § 504, which states:

> (a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—
>
> (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
>
> (2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Some available remedies for the alleged copyright infringement by Defendants in this case are Catherine Alexander's actual damages resulting from the alleged infringement and any profits of the infringers that are attributable to the alleged copyright infringement.

V. INFRINGERS' PROFITS ATTRIBUTABLE TO ALLEGED INFRINGEMENT

I understand that Plaintiff has requested discovery into Defendants' profits but, as of the date of this report, has not received information sufficient to determine what those profits are. Accordingly, this report is limited to an analysis of the attribution of the alleged infringement to the sales or profits of the subject Video Games more generally. I will supplement my opinions if and when additional information becomes available to me.

As stated above, in the event there is a finding of copyright infringement, "[t]he copyright owner is entitled to recover…any profits of the infringer that are attributable to the infringement." It is my opinion that a portion of the profits of the Video Games are attributable to the alleged copyright infringement. I will further supplement my opinions if and when Defendants provide proof of any deductible expenses and proof that elements of profit are attributable to factors other than the copyrighted works.

Game developers use licensed IP and copyrighted works in their games because they have an expectation it will lead to an increase in sales and/or profits. Use of real-life wrestlers is an important part of the Video Games and realistic or true-to-life depictions of characters in the Video Games is a component driver of sales. Fans and prospective purchasers of video games, including the WWE franchise of video games, have come to expect and demand verisimilitude. Fans, prospective purchasers of video games, and the public will criticize video games, generating negative attention and dampening sales, when verisimilitude or authenticity is perceived as poor.

The inclusion of Randy Orton in the Video Games serves the purpose of appealing to WWE and Orton's fan base as well as driving sales. Orton's popularity is a contributor to the success of the Video Games and to the Video Games' sales and profits. Fans, users and prospective purchasers expect a realistic approximation of real-life characters, including Orton, and therefore expect Orton's appearance to be as faithful to real life as possible. The Video Game developers understand this demand and deploy significant resources to meet it. The drive for more powerful and faster graphics capabilities in video games is one way the technology tries to meet the public's demand for realism; inclusion of licensed IP and copyrightable content is another.

Tattoos are an important part of Randy Orton's appearance. The faithful recreation or copying of Randy Orton's appearance (including his tattoos) is essential for the Video Games to achieve verisimilitude sufficient to meet consumer's demands for realism. Therefore, the use of Orton's copyrighted tattoos is an important component in the success of the Video Games, because it enables the Video Game developers to achieve verisimilitude and satisfy consumers. Without the copyrighted tattoos, Orton's character in the Video Games would be perceived as phony or un-realistic and sales of the Video Games would suffer.

a. Game Developers Use Licensed IP Because They Expect it to Increase Sales

The video game industry is highly competitive, each year there are more titles released than consumers and fans have the time to play. It is an industry in which a minority of the released titles garner a majority of the revenue. Thus game publishers are very interested in identifying ways for their products to get consumer attention. One way that this is done is by paying to license some other intellectual property (e.g. media franchise, characters, story, brand, etc.) in order to leverage attention and recognition from the consumer market. Video game companies do this for at least the following two reasons:

1. Fans of the licensed intellectual property might be interested in the game because of the license.
2. Regular consumers are more likely buy the game due to brand recognition of the license.

Licensing someone else's intellectual property is not free. In addition to the cost of the license, there are additional expenses incurred due to additional overhead in the production process. For example, character designs often need to be approved by the licensor prior to their use in the game and these approvals may require additional development time. While there may be some gains, especially in the case of fictive intellectual property (e.g., Harry Potter) because significant creative work can be leveraged from the intellectual property, overall the time, effort, and cost associated with developing the game remains largely the same with or without the intellectual property. The game character models still need to be created, artwork must be made, and so on. Game licensees very rarely obtain digital materials from a licensor that can be used "as-is" in a game. All of the work must be created from the ground up. Thus, using a licensed property by a videogame company always adds to the expense of creating a game. How much more expensive will depend on the exact license and the terms of its use. However, it is always more expensive. The game developer, in order to make use of intellectual property feasible, expects that (1) the game will sell more copies due to the licensed material; and (2) returns from the increase in sales will be greater than the cost of the license.

For this case, it is reasonable to assume that the developer and publisher of the Video Games expected to and did sell more copies due to the use of the WWE license, which includes use of its roster of characters, events, and more. Accordingly, the Defendants expected that use of copyrighted material, like all optional intellectual property, in the form the tattoos on Randy Orton, would drive sales and increase profits to some extent.

b. Specific Wrestlers are Important to Drive Interest and Sales in WWE Videogames

As in other licensed intellectual property, there are some aspects of a license that are more important or valuable than others. This is often due to both consumer expectations as well as degree of recognition. For example, a "Harry Potter" video game set far away from Hogwarts and featuring none of the characters from the books, would still benefit from the Harry Potter brand recognition, but less so than if it included what consumers would expect, such as characters and elements from the books. In terms of characters, Harry Potter himself is also more important than the other characters.

The case of WWE video games is no different. Here the wrestlers themselves are the characters and not all wrestlers have the same value for a videogame publisher. Some wrestlers are deemed more "valuable" than others based on their abilities to drive sales by satisfying consumer expectations or demands as well as being recognizable to consumers. Wrestlers deemed more valuable will, for example, be selected to feature on the cover of the games as well as appear in other promotional materials such as ads, television commercials, and the like. For example, Orton's videogame representation appears in commercials for WWE2K16, WWE2K17, and WWE2K18 as seen in TAKE-TWO_0000178.mp4, TAKE-TWO_0000180.mp4, and TAKE-TWO_0000473.mp4 respectively. In addition, more valuable wrestlers may also assist in promotion and advertising of the video games in which their characters appear.

The roster of wrestlers (a list of "who's in and who's out") is itself used by WWE video game companies for promotional and advertising purposes. Prior to the release of a game publishers provide announcements of which wrestlers will appear in the game to drive interest and demand. This is often accompanied by promotional videos featuring those wrestlers in real life. Similarly, they might release "teaser" videos and screenshots demonstrating what those wrestlers look like in the game as well as information on game features. As the release date nears, more details of the final roster are provided to the public. Sometimes, due to fan expectations and speculation, the developer may even announce certain wrestlers that are not going to be included in the game.

c. In the Context of Wrestling Video Games Randy Orton is an Important Character

Given that the WWE Video Games feature a roster of over one hundred characters it is reasonable to wonder how important Randy Orton is to those videogames in which he appears.

We can examine this question from two complementary perspectives.

First, we can examine how important Randy Orton is in the world of WWE wrestling. Orton is currently at 13-time world champion with the WWE and remains active winning the 2018 United States Championship. He headlines significant WWE events. Orton is currently one of the more important wrestlers in the WWE. Given his importance to WWE, it is clear that he is important to WWE Video Games, which are themselves modeled after real-life characters and situations. This is especially true since there is significant crossover between fans of WWE and purchasers/players of WWE Video Games.

Another proxy for measuring the popularity of Randy Orton in the WWE universe is to assess Orton's social media presence in comparison with other social media metrics. Social media has become an important advertising and marketing tool for content creators and distributors and has also become an important branding tool for actors and performance talent. Randy Orton maintains an official Twitter profile @RandyOrton that has approximately 5.9M followers. The WWE itself (@WWE) has less than double that amount (10.3M) followers and the Twitter page for WWE 2K19 has only 908,000 followers. In this sense, Orton himself is more than half as popular the whole WWE and more than 6 times as popular as the latest WWE video game.

Second, we can examine how important Randy Orton is in the world of WWE videogame wrestling. It is important to examine this separately from his popularity in WWE wrestling because in the case of video games, developers have access to current wrestlers but also all of those that have historically participated in the entertainment sport. Thus, the range of possible characters is much larger – for example WWE 2K17 includes a playable version of "Andre the Giant", however the athlete and actor who portrayed him passed away in 1993. When deciding which characters to include in a game, developers must consider their popularity even when they are no longer active wrestlers. Furthermore, there are many reasons for a videogame developer to choose to not include a particular wrestler or character in a game: they might not be popular enough, there might be contractual issues, and there might be production issues. For any wrestler included in a game, developers must weigh the benefit of including them with the costs associated.

Randy Orton is currently one of the more important wrestlers in WWE Video Games. Looking at another comparison from Twitter, Seth Rollins, who appears on the cover of WWE 2K18, has 3.32M Twitter followers compared to Orton's 5.9M. In addition, Randy Orton was featured on the cover of the WWE '12 video game developed by Yuke's and published by THQ. The wrestler featured on the cover of a title is chosen because they are both important to the game but also because it is expected that this will draw additional sales. Orton also participated in the marketing and promotion of the game, for example by congratulating the publisher (THQ) for reaching a milestone in social media.[1]

Randy Orton has been included in numerous WWE videogames. As early as 2008, when interviewed on popular videogame website Destructoid, Orton was unsure how many times he had appeared in a videogame: "I don't know. Maybe ten or twelve, I'm not really sure." (Chester, 2008[2]). In a 2014 article on WhatCulture.com, Orton is listed as the 23rd wrestler with the most videogame appearances (then at 20+)[3].

It is clear that Orton's character is considered a successful asset in the WWE video game franchise because Orton's character has appeared, and continues to appear, in many WWE video games. Popular online database website IMDb has an incomplete list of Randy Orton's acting credits for 16 videogame titles. Orton received credit for 13 appearances as "voice" in the video games. This indicates that his real-life voice was used in a game (rather than using a 'sound-alike' actor). The practice of using the real actor/performer is not used for all the characters in the video

[1] "Randy Orton Empowers the WWE Universe" - https://www.youtube.com/watch?v=xPNHP7vHX5Y
[2] https://www.destructoid.com/wwe-s-randy-orton-talks-videogames-violence-having-his-face-in-a-game-110107.phtml
[3] http://whatculture.com/wwe/33-wrestlers-appeared-video-games?page=3

games, but rather is reserved for the most important ones, further indicating Orton's more significant contributions to the success, sales and profits, of the video games.

In any given year, WWE video games do not include all the characters (current, historical, etc.), so the regular and consistent inclusion of Randy in the games is indicative of his importance in WWE Video Games.

d. Randy Orton's Tattoos are an important part of his Wrestling Identity and Persona

WWE wrestler's identity and personas are carefully crafted and constructed to appeal to fans and drive the commercial interests of the organization. This identity can include several components such as a unique name (e.g. "The Rock"), catchphrases, costuming elements, and special (signature) wrestling moves. Randy Orton is no different. Thus, it is important to examine the extent to which his tattoos contribute to his identity and persona as a wrestler.

The WWE supports the notion that Orton's tattoos are an important part of his identity and persona. In an article titled "The 20 coolest tattoos in WWE history", Randy Orton appears in the 5th spot. This article emphasizes how well his tattoos follow the contours of Orton's physique as well as how Orton "makes sure to get his tats touched up once a year — a process that takes about six hours — to prevent any unwanted fading." (WWE.com Staff 2014)[4]. A photo gallery titled "The 50 Coolest Tattooed Superstars in WWE History", also on the WWE website, also includes Randy Orton. There are other similar lists not curated by the WWE. For example, Randy Orton appears in the #6 position in the "Top 10 coolest WWE Tattoos"[5] and also appears on page two of "The 25 Best Tattoos In Wrestling History"[6].

Randy Orton's tattoos are clearly an important part of his identity and persona as a WWE wrestler. Furthermore, Orton's tattoos feature prominently in promotional material, and when Orton performs he does so bare-chested, with his tattoos clearly visible. Randy Orton's tattoos are distinctive and defining in the same way that the lighting-bolt shaped scar defines and distinguishes an important part of Harry Potter's identity. A representation of Randy Orton, in his wrestler persona, which omitted (i.e. removed) his tattoos would not be perceived as accurate and truthful because they are such an important part of who he is.

More generally, we can even say that tattoos, as a form of personal identity and expression, are important in the world of WWE wrestling. The Video Games include a mode in which players can create their own wrestlers – the creation process covers a variety of physical attributes for the wrestler (e.g. facial features, height, hair style) including, for example in WWE 2K16, the possibility to design "body art" (tattoos) for six different locations (left and right arms, back, left and right legs, and chest). Were tattoos not important in WWE wrestling, it would be hard to justify the additional cost of developing these features.

[4] https://www.wwe.com/classics/classic-lists/20-coolest-tattoos-in-wwe-history
[5] https://www.sportskeeda.com/slideshow/top-10-coolest-wwe-tattoos/5
[6] http://ringsideintel.com/2017/10/wrestling-tattoos/2/

e. Verisimilitude of Appearance is Important in Videogames including WWE Video Games

Fans expect and demand that characters in video games look their real-world counterparts. They will complain and generate bad press when the video game characters are perceived as unrealistic or phony. Even Randy Orton has complained when his WWE video game character appears inauthentic.[7] Videogame companies use verisimilitude to promote and sell their games – highlighting improved visuals and accuracy. This applies to all kinds of games, but is especially applicable when there are real-life counterparts to compare against, as in the case of video games derived from real-world fictive material and characters. This includes all manner of movie tie-ins, sports-related videogames, as well as wrestling videogames.

Video game developers know and understand this and therefore strive for verisimilitude. They know too the market consequences of failing to meet fans expectations of authenticity. The videogame version of the 2003 movie Charlie's Angels: Full Throttle, which featured voice-acting by the film's stars Cameron Diaz, Drew Barrymore, and Lucy Liu, was reviewed very poorly because, among other things "[t]he in-game character models for Natalie, Dylan, and Alex are unbelievably bad, with some of the cheapest and dirtiest facial maps, textures, and animations you'll ever find in this generation of console gaming." (Navarro, 2003)[8]. The video game Shaq-Fu, featuring NBA basketball star Shaquille O'Neal, was criticized because "Shaquille doesn't look much like his real-life counterpart, even in the larger static shots. While it's understandable that the small fighting Shaq has a generic look, there's no excuse for the lousy close-ups. If not for the blue and white pinstriped Orlando Magic (the team he used to play for) uniform, you might not even be able to hazard a guess that the player represented is Shaquille O'Neal." (Weiss, 2014)[9]

The market expectation of authenticity and verisimilitude is no less acute for WWE games. It is important that the characters in the game look like the people they're meant to represent. This applies to all aspects of their appearance including their clothing/costumes, hair, facial hair, voices and tattoos.

f. Videogame Fans and Prospective Buyers Care About Orton's Appearance in Videogames

Graphics, and their quality, have a long tradition of being something that matters and is important to the game-buying public. The quality of a game's graphics, their improvement over previous titles and competitors' titles are also commonly used to promote and sell games. For many of the more dedicated consumers playing the most recent releases may require significant (and expensive) upgrades to their personal computing or video game console hardware in order to get the best and highest quality in visual fidelity. Similarly, videogame consumers are quick to comment on and criticize games when they feel that the quality of the graphics is not up to their

[7] https://www.instagram.com/p/Bo5gxBJHCX5/?utm_source=ig_embed

[8] https://web.archive.org/web/20110906083525/http://www.gamespot.com/gamecube/action/charliesangels/review.html

[9] As stored at: https://web.archive.org/web/20141114231351/http://www.allgame.com/game.php?id=12315&tab=review

expectations or industry or other standards. This applies especially to characters based on real-life persons when the expectation (driven in part by marketing and advertising) is that in-game versions of characters should be recognizable in terms of notable physical attributes and characteristics such as hair style (including color, length, etc.), skin tone and markings (e.g. tattoos), facial hair, and more. These expectations also apply to garments, costuming elements, and such. For example, sports videogame fans are known to care about, and complain, when uniform details are inconsistent with the real world.

Video game fans, and purchasers and prospective purchasers of the WWE series of video games, expect realism to the extent that it is feasible. In the case of the Orton character, purchasers expect that Orton video game character will appear as the real-life Orton does, tattoos and all. Defendants therefore were and are under pressure to meet consumers' expectations for verisimilitude and accordingly included Orton's tattoos as faithfully as possible in the Orton video game character. By including Orton's tattoos in the Orton video game character, Defendants tried to meet consumer expectations, bounded only by the limits on graphics technology. Clearly it was important to capture real-life Orton (including tattoos) in the video game version of Orton in order to satisfy consumer demand for realism and prevent any fan criticism for an unrealistic portrayal. In fact, this capture process is traditionally done by directly photographing the person who will be represented in the game. Orton described this process for videogame title Monday Night Raw (published by THQ): "every once in a while, THQ comes by and takes digital pictures of me, my tattoos, my hands, my trunks -- all the way down to the sharkskin leather on my boots. They get it all and add it to the magic of the game." (Orton, as quoted in Saltzman 2011)[10]

This level of attention and concern to the realistic appearance of the video game Orton character is evident in the amount of meta-criticism and content that is dedicated to the very issue. For example there are numerous online videos dedicated to the video game *character* Randy Orton's appearances in *videogames*:

- "A Visual History of Randy Orton in WWE Videogames (2002-2017)!" – (100,000+ views) https://www.youtube.com/watch?v=DVn9RHSxPHk
- "Randy Orton's Entrances in WWE Video Games" - https://www.youtube.com/watch?v=eAuVtMw4U0I
- "WWE 2K18 - Rusev & Randy Orton Entrances!" - https://www.youtube.com/watch?v=6f46A5ZHDPw
- "WWE Games Evolution - Randy Orton (SYM - WWE 12)" - https://www.youtube.com/watch?v=ge478sxRPu0
- "WWE Allstars: Randy Orton Finisher Video" - https://www.youtube.com/watch?v=oWNYgHV7Kq4
- "Randy Orton ~ All Finishers in WWE Video Games (WWE Shut Your Mouth – WWE 2K17)" - https://www.youtube.com/watch?v=bJhqdHsFWjg

It is clear that fans track, follow and care about video game developers' ability to create verisimilitude in video games, more particularly in wrestling video games, and even with respect to the specific video game character Orton, including his tattoos.

[10] http://content.usatoday.com/communities/gamehunters/post/2011/04/q38a-wwes-randy-orton-talks-video-games/1#.W-id7pNKjtU

g. Orton's Appearance in Videogames is Important to Him, Including his Tattoos

In 2008, during a tour to London promoting the SmackDown vs. Raw 2009 videogame (published by THQ) Mr. Orton commented to Eurogamer that he both enjoyed playing versions of himself in videogames and that he was happy with the accuracy of his tattoos in the version of the game he was promoting (Minkley 2008[11]). A few years later, in an article posted on ESPN Randy Orton commented on his virtual appearance in the WWE '12 game noting the realism of the visuals of the game (which have only improved since WWE'12 was released), how his depictions in the games have changed as he has changed his own appearance over the years including both facial hair and tattoos.

> *I guess that's why Randy Orton is a big fan of his video game doppelganger as the World Heavyweight Champion and "WWE 12" cover athlete says he can bump all night and still walk away without a scratch thanks to the power of Xbox.*
>
> *And to Orton, that's almost as cool as his virtual beard.*
>
> *"Man, it looks pretty sweet," Orton says with a laugh after checking out his character's new facial hair. "**The game is so realistic**, and **I like the way it looks on me in real life, so of course I like how it looks in the game**."* [emphasis added]
>
> *"I actually have all of the "Smackdown vs. Raw" games at home and it's funny, because one thing I want to do is go back and check out my character throughout the years. **You can actually track the evolution of everything from my tattoos to my beard through the games. It's like a virtual scrap book."*** [emphasis added] – Robinson 2011, ESPN[12]

Orton is also not shy about expressing his displeasure when he does not approve of his videogame representation. On October 13, 2018, he posted a screenshot of his in-game persona's face to his Instagram account (4.5 million followers as of this writing) together with the caption "WOW #wwe2k19 f@ck you too!"[13]

As noted above, real-life characters, upon whom video game characters are based, are an important part of the advertising and promotion of video games, including WWE Video Games. Orton himself has participated in the promotion and advertising of WWE video games and his concerns and expectation for realism in his Orton character (including its tattoos) is clearly shared by WWE as well. Accordingly, it influences the purchasing behavior of consumers, such that, all

[11] https://www.eurogamer.net/articles/wwe-star-wants-more-violence-in-games (Mr. Orton was "particularly pleased with the accuracy of his tattoos in this year's update.").
[12] http://www.espn.com/espn/thelife/videogames/blog/_/name/thegamer/id/6889202/wrestlers-debate-their-wwe-12-ratings?readmore=fullstory
[13] https://www.instagram.com/p/Bo5gxBJHCX5/?utm_source=ig_embed

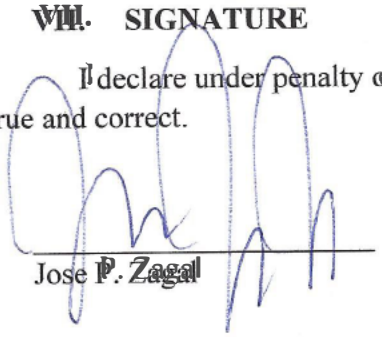
else being equal, the more realistic, the better sales will be. Therefore, the realistic depiction of tattoos on the video game character Randy Orton, drawn from copyrighted works, are a component in the success, sales and profits, of the Video Games. Stated another way, a portion of the sales and profits of the Video Games are attributable to the copyrighted works.

VI. CONCLUSION

A realistic portrayal of Randy Orton is important to the success and sales of WWE Video Games. WWE video game developers attempt to achieve verisimilitude with the Randy Orton video game character in part by copying and reproducing his copyrighted tattoos. A portion of the success, sales, and profits, of the Video Games are attributable to these copyrighted tattoos.

VIII. SIGNATURE

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.



Jose P. Zagal

4/14/18

Date